Supreme Court, U.S.
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

HARVEY BONHAM FOX,
Petitioner,
v.
DAVID R. HINSON, Administrator,
Federal Aviation Administration,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Transportation Safety Board and the Circuit Court improperly found a violation of 14 C.F.R. § 91.9 [now 91.13(a)], which provides that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another" in the absence of any evidence that Petitioner acted in a careless or reckless manner or any assertion that actual damage to life or property occurred.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

On May 30, 1991, Administrative Law Judge Joyce Capps found Petitioner in violation of 14 C.F.R. § 91.65(d) and 14 C.F.R. § 91.9 (now § 91.13(a)). The Oral Initial Decision and Order is attached as Appendix A. That Order was affirmed by the National Transportation Safety Board in its Opinion and Order of March 31, 1994, attached as Appendix B. The Order of the United States

Court of Appeals for the District of Columbia Circuit affirming the National Transportation Safety Board Opinion and Order was handed down on December 26, 1995. That Order is attached as Appendix C.

JURISDICTIONAL GROUNDS

Petitioner requests review of the judgment of the District of Columbia Circuit entered December 26, 1995, denying Petitioner's Petition for Review of the NTSB Order dated March 31, 1994. The Supreme Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Jurisdiction of the Administrative Law Judge was based on 14 C.F.R. § 821.30. Jurisdiction of the National Transportation Safety Board was based on 14 C.F.R. § 821.47. Jurisdiction of the District Court was based on Title 49 U.S.C. § 1486(a) and 14 C.F.R. § 821.64.

RELEVANT STATUTORY PROVISIONS

This Petition concerns the provisions of 14 C.F.R. § 91.9 (now § 91.13(a)), which is set out in Appendix D.

STATEMENT OF THE CASE

Events occurring on TWA Flight 559

On the evening of November 21, 1989, TWA flight 559, a DC-9-32, operated between St. Louis, Missouri, and Austin, Texas. Petitioner herein, Captain Harvey Bonham Fox, was assigned as pilot in command of the flight. The flight was scheduled to depart at 7:30 p.m., and Captain Fox had some concern about the weather that might be encountered along the route. Therefore, he assigned his First Officer, Phillip Moore, to actually fly the aircraft while Captain Fox handled the radios and manned the radar equipment on the aircraft.

After departing St. Louis, Flight 559 was cleared by Kansas City Center to climb to Flight Level 230.[1] When the clearance to Flight Level 230 was received, Captain Fox repeated the clearance to the controller. First Officer Moore also repeated the clearance and dialed in the altitude assignment on an "altitude alerter", located in the cockpit.

As Flight 559 was leaving the clouds Kansas City Center gave a frequency change to 132.65. Captain Fox took out his pen and wrote down "132.65" on a notepad. He reached up to turn off the light he had been using and began to move his hand down to tune the radio. At that point lightning from thunderstorms ahead of the aircraft began to light up the sky. Captain Fox adjusted the range scale on the radar in an attempt to get the thunderstorms on the radar screen. At that same time the First Officer called out for a change in the setting of the altimeters on the aircraft. After completing those two actions Captain Fox returned to the radio to enter the new frequency. Instead of dialing in "132.65", Captain Fox entered "132.60".[2] At that point he picked up the microphone and, transmitting on the new frequency of 132.60, said "TWA 559 out of 18.4 for 230".[3]

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[1]Flight Level 230 is based upon standard atmospheric pressure and corresponds to an altitude of approximately 23,000 feet. All aircraft flying above 18,000 feet use the same pressure reference and, therefore, maintain constant altitudes relative to each other.

[2]A frequency of "132.65" is 132.65 Megahertz and is in the Very High Frequency (VHF) range used for aircraft to ground communications. The aircraft radio is designed to enter frequencies by turning knobs, and frequencies are entered in increments of 0.05 Megahertz, i.e., 132.55, 132.60, 132.65, 132.70, etc.

[3]This report indicated that TWA 559 was climbing through an altitude of 18,400 feet on the way to its assigned altitude of Flight Level 230 (approximately 23,000 feet).

The next thing Captain Fox heard over the radio was "TWA 559 cleared to 290".[4] Captain Fox acknowledged the transmission by replying "TWA 559 up to 290". First Officer Moore also acknowledged this new altitude assignment by repeating what he had heard to Captain Fox, and by dialing the new altitude into the "altitude alerter". At that point one of the Flight Attendants called the flight deck and Captain Fox took the call. While he was taking the call he turned radio communication duties over to First Officer Moore. After resuming communications duties Captain Fox transmitted to Kansas City Center that Flight 559 was "out of 280 for 290" and Center acknowledged the transmission.[5]

At that point the controller called Flight 559 and said that the aircraft had not been assigned to Flight Level 290. Captain Fox repeated that the Flight had in fact been cleared to that altitude. The controller told Flight 559 to change to a frequency of "132.65", and Captain Fox did so. When he checked in, Captain Fox was told that Flight 290 was "fine, you're at 290, good, stay there, that's a good altitude for you". In fact, *that was the only altitude available at that time.* The rest of the flight was uneventful.

Events occurring at Kansas City Center

Mr. David Kleber was the FAA controller assigned to Sector 42 of the Kansas City Center on the night in question. In that position he was responsible for communications on six different frequencies, including 132.60, but excluding 132.65. The frequency of 132.65 was being worked by Sector 29, which was located across the room from Mr. Kleber.

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[4]Flight Level 290 is approximately 29,000 feet.

[5]This transmission indicated that the aircraft was leaving Flight Level 280 (approximately 28,000 feet) for the assigned altitude of Flight Level 290 (approximately 29,000 feet).

Mr. Kleber testified that he heard an unidentified aircraft on one of his frequencies report "out of 18, climbing to 23". When Captain Fox made that call Mr. Kleber was talking to another controller on the "hand off line" and, thus, had another voice in his ear distracting him at the time. Mr. Kleber testified that he was receiving a request from another Sector to reassign a Northwest Airlines Flight, NWA 226, to Flight Level 290. However, instead of issuing the clearance to Flight 226, Mr. Kleber mistakenly issued the clearance to Flight "229". He heard an unidentified aircraft acknowledge the clearance to "29" [Flight Level 290].[6] At that point Mr. Kleber knew he had a problem and attempted to contact what he felt was an unidentified aircraft on one of his frequencies. Finally, he heard TWA Flight 559 reporting "out of 28 [Flight Level 280] for 29 [Flight Level 290]" and he established contact. Mr. Kleber verified that *Flight Level 290 was an appropriate altitude for the aircraft* and had Flight 559 contact the appropriate controller.

NTSB Oral Initial Decision and Order

Judge Capps ruled that "[a]n improper frequency setting always gives rise to *potential danger* so, therefore, the 91.9 [violation] has also been established" (Appendix A, p. 4, ll. 9-11, emphasis added). She also refused to consider Petitioner Fox's proffered evidence that the mis-dialing of a frequency was such a commonplace occurrence that it could not be considered negligent.[7]

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[6] Judge Capps found, and the NTSB corrected, that Captain Fox had actually acknowledged the clearance as TWA 559, and that this acknowledgment should have been picked up by the controller (Appendix A, p. 4, ll. 18-21).

[7] At the hearing before the Administrative Law Judge Petitioner Fox offered a report of a study conducted by the FAA System Improvement Division in 1989 involving a survey of readback errors encountered

The Circuit Court's Memorandum accompanying its Judgment denying the Petition for Review simply affirmed the NTSB's position that even a non-negligent violation of an operational regulation was sufficient to support a finding of a "residual violation" of 91.9, even when there was no actual danger resulting from the incident (Appendix C).

REASONS FOR GRANTING THE WRIT

THIS PETITION PRESENTS AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION INVOLVING TENS OF THOUSANDS OF PILOTS AND INVOLVING CONDUCT THAT OCCURS DURING THOUSANDS OF FLIGHTS WITHIN THE UNITED STATES EVERY DAY.

Every pilot in the United States, from a low time student pilot to the most senior airline captain, has studied the Federal Aviation Regulations, has been tested on those Regulations, and is aware that they govern every aspect of every flight within the United States. Those pilots have read and applied a regulation that tells them they can be punished if they operate an aircraft in a careless or reckless manner, and if that operation endangers the life or property of another. That punishment can involve probably the most severe penalty that can be imposed on a person in love with aviation — the loss of his or her right to fly an aircraft. Pilots tend to be a careful group of individuals who are extremely concerned with safety because of the unforgiving consequences of any lapse of care or judgment. Nevertheless, the most careful pilot in the world who makes a non-negligent

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during a five day period throughout the United States. That study determined that 40% of the errors detected related in improper frequency selection. At the Kansas City Center (the one involved in the subject incident) the error rate was actually 47%. Judge Capps refused to admit the Report and refused to credit any testimony regarding the Report or its conclusions.

mistake during a flight — a mistake that does not endanger life or property, and that has absolutely no effect on the safety of the flight — can still be grounded by the FAA, applying the interpretation of 91.9 adopted by the NTSB in this case and affirmed by the Circuit Court. It is respectfully submitted that virtually every aviation pioneer, including Orville and Wilbur Wright, Charles Lindbergh, and Amelia Earhart would have found themselves grounded if the NTSB's interpretation of 91.9 was applied to their actions.[8]

This Court has recognized the importance of *certiorari* when important and recurring, questions involving the interpretation of federal law arise (*Swanner v. Anchorage Equal Rights* (1994) No. 94-169, ____ U.S. ____ (Thomas, J., dissenting), and when conflicts arise regarding the meaning of provisions of federal law (see generally *Braxton v. United States* (1991) 500 U.S. 344; *Langenkamp v. Culp* (1990) 498 U.S. 42). Petitioner respectfully urges that the interpretation of the regulation in question, which applies to every flight taking place every day within the United States, and which involves the most fundamental and basic standard of conduct governing those flights, presents such an important and recurring question as to merit this Court's consideration.

THE NTSB AND THE CIRCUIT COURT ERRONEOUSLY HELD THAT A NON-NEGLIGENT, NON-CARELESS ACT WHICH DID NOT RESULT IN ACTUAL ENDANGERMENT OF LIFE AND PROPERTY COULD NEVERTHELESS BE A VIOLATION OF 14 C.F.R. PART 91.9.

This petition is presented so that this Court may address an erroneous interpretation of the Federal Aviation Regulations on the part of the Federal Aviation Administration.

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[8]Of the historical and mythical characters associated with flight, Petitioner does concede that Icarus might have been subject to action by the FAA under 91.9.

That erroneous interpretation has been adopted by the National Transportation Safety Board and was recognized by the Circuit Court in this case.

Title 14 C.F.R. Part 91.9 provides:

> "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

That regulation clearly proscribes only two categories of action: careless or reckless operation of an aircraft. Moreover, the regulation plainly requires that the careless or reckless conduct result in actual endangerment to life or property. In complete disregard of the clear and unambiguous language of the regulation, Judge Capps held that the mere act of selecting the wrong frequency *always* gives rise to *potential* danger, and that such an act therefore violates § 91.9 (Appendix A, p. 4, ll. 9-11). This interpretation of a regulation in a manner completely contrary to the plain language of the regulation constitutes a violation of Petitioner's due process rights.

A penal statute is one which is expressly enforceable by fine, imprisonment, or similar punishment (*Taylor v. United States* (1845) 44 U.S. 197). A statute is likewise considered penal in nature if it includes penalties and forfeitures (*United States v. Constantine* (1935) 296 U.S. 287). Statutes authorizing revocation of a license, or which have the potential to bring about a revocation, are considered penal (*Chevrolet v. New Motor Vehicle Board* (1978) 146 Cal.App.3d 533). It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government seeking to enforce the penalty (*Federal Communications Commission v. American Broadcasting Co.* (1954) 347 U.S. 284, 296) and that one "is not to be subjected to a penalty unless the words of the statute plainly impose it" (*Keppel v. Tiffin Savings Bank* (1905) 197 U.S.

356, 362; *Commissioner v. Acker* (1959) 361 U.S. 87, 91; see *United States v. Moore* (D.C.Cir., 1979) 613 F.2d 1029, 1043). The Court has noted in an analogous context that "when [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite" (*United States v. Universal C.I.T. Credit Corp.* (1952) 344 U.S. 218, 221-222).

The particular regulation at issue, 91.9, prohibits "careless or reckless" operation of an aircraft "so as to endanger the life or property of another." That language is both clear and definite. By its very terms, the statute applies *only* to conduct that is either negligent, reckless, or intentional. The NTSB, however, held that *any* deviation from the standard of conduct established by a regulation is sufficient to support a "residual" or "derivative" violation of 91.9. (Appendix B, p. 7 & 8).[9] Such an interpretation totally ignores the legal requirement that 91.9 be strictly interpreted against the government. It is also a principle of statutory construction that effect must be given, if possible, to every word, clause and sentence of a statute (*Helton v. Fauver* (3d Cir., 1991) 930 F.2d 1040). A construction which results in absurd consequences must be avoided (*In re Brichard Securities Litigation* (N.D.Cal., 1992) 788 F.Supp. 1098).

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[9]Petitioner does not challenge the fact that even a non-negligent act may, under appropriate conditions, constitute a violation of a regulation. For example, Petitioner does not challenge before this Court the NTSB finding that Petitioner violated 14 C.F.R. Part 91.65(d) (prohibiting compliance with a clearance issued to another aircraft), even though that violation may have been unintentional and non-negligent. That regulation establishes a strict liability standard of conduct, unlike the regulation challenged herein, which establishes only a negligence standard of liability.

In light of the foregoing legal principles, it is clear that the NTSB erred, as a matter of law, in holding that even a non-negligent deviation from an operational regulation which results in no actual endangerment is sufficient to support of violation of 91.9. In fact, what the NTSB has done is take a regulation which clearly and unambiguously proscribes only "careless or reckless" conduct and converted it into a regulation which creates an irrebuttable presumption of negligence for *any* conduct, even non-negligent conduct. The term "reckless" has a well defined and understood legal meaning:

> "The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. *See* Prosser and Keeton § 34, pp. 213-214; Restatement (Second) of Torts § 500 (1965)." *Farmer v. Brennan* (1994) No. 927247, ____ U.S. ____.

The NTSB's interpretation gives the regulation an extremely liberal and broad s. ope, whereas rules of statutory construction mandate that the regulation be interpreted narrowly and strictly against the government. And by finding a "residual" or "derivative" violation of 91.9 for even non-negligent deviations from an operational regulation the NTSB has expanded the scope of liability far beyond the plain meaning of the "careless or reckless" language used in 91.9. Finally, NTSB's interpretation leads to absurd and unreasonable consequences. For example, if Captain Fox mis-dialed "132.60", began to transmit, immediately caught his mistake and changed to "132.65" the FAA and the NTSB would nevertheless find a violation of 91.9. If Captain Fox had begun to comply with the clearance issued to Northwest 229, but immediately caught his error and never deviated from his altitude assignment, the NTSB would likewise find him in violation of 91.9. In fact, if Captain Fox

Captain Fox had mistakenly read back the clearance and simply touched the power levers before catching his mistake, the NTSB would still find that he had been "careless or reckless" in his operation of the aircraft. Clearly, that cannot be the intent of the regulation, and it is absurd to hold that non-negligent, non-careless, non-reckless operation of an aircraft can nevertheless be "careless and reckless". Such an interpretation makes no sense whatsoever. In fact, it is respectfully submitted that such an interpretation would render the regulation constitutionally defective as hopelessly vague and ambiguous in that there would be no possible means of determining exactly what conduct is proscribed. Penal statutes are construed narrowly to insure that no individual is charged with a violation unless "a fair warning [has first been] given to the world in language that the common world will understand of what the law intends to do if a certain line is passed" (*McBoyle v. United States* (1931) 283 U.S. 25, 27). The regulation in question gives the world fair warning that it prohibits careless and reckless conduct that results in actual endangerment to life or property. What is unfair is the action of the FAA and the NTSB in applying that regulation in situations where it has no applicability whatsoever.

CONCLUSION

As indicated in Petitioner's offer to proof to Judge Capps, nearly one-half of the incidents recorded during the study period were attributable to mis-dialing of a frequency. The mistake was caught and corrected and the flight proceeded uneventfully to its destination, *exactly as happened in this case.* No lives were endangered, *just as no lives were endangered in this case.* And yet, every one of those thousands of pilots was in violation of 91.9, as interpreted by the NTSB, and their flight privileges were placed in serious jeopardy. The regulation at issue does not proscribe non-negligent conduct, the regulation does not proscribe conduct that does not result in actual endangerment to life and property, and any interpretation that says it does is plainly and simply wrong. This Court should grant *certiorari* to make clear the scope of the regulation.

DATED: March 12, 1996

Respectfully Submitted,

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APPENDIX A

BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD
ORAL INITIAL DECISION AND ORDER

JOYCE CAPPS,
Administrative Law Judge:

This proceeding comes before the National Transportation and Safety Board pursuant to the provisions of Section 609 of the Federal Aviation Act of 1958, as amended, on the appeal of Cpt. Harvey Bonham Fox, Respondent herein, to the Order of Suspension dated September 24, 1990, suspending his Airman Certificate for a period of 30 days, which, however, is being waived at this point in view of a stipulation arrived at by counsel that a timely NASA report has been filed, due to his alleged violations of Sections 91.65(d), 91.75(b), and 91.9 of the Federal Aviation Regulations.

After due Notice to the parties, this matter came on for trial in Kansas City, Missouri on May 30 (by the way, I want to thank both counsel for moving this case up a day) 1991, at which time the Administrator was represented by John W. Escott, Esq., and Respondent was represented by Mary McGuire Voog, Esq.

There is very little in this case that has been disputed. In fact, I don't think any of the facts have been disputed. What is in dispute is the interpretation to be given to the facts as they pertain to this case. The Respondent is a high time pilot with 14,000 hours and long experience. He has been employed by TWA since 1966 first as an engineer, then in 1968 he became first officer, and he has been operating as a captain on the DC-9 since 1989.

On November 21, 1989 the Respondent was the pilot in command of a DC-9 model 32 aircraft that at the time was being utilized as TWA flight No. 559. It was the fourth leg of a flight that he had been on all day with first officer by the name of Phillip Moore. Phillip Moore's also the holder of an ATP. The flight was scheduled to leave at 7:30 P.M. and there was some concern on the part of Cpt. Fox about the weather that they were going to hit in the Austin area. This flight was scheduled from St. Louis, Missouri to Austin, Texas. It was due to this concern of the weather that Cpt. Fox asked his first officer to take control of the flight while he, the Respondent herein, manned the radar equipment as well as handling the radios. This aircraft was equipped with what has been referred to in the evidence as a single type radio as opposed to the dual type. It was explained in the testimony that the dual radio is a much more full-proof type system in that the pilots do not have to write down or commit to memory certain frequencies and other instructions that they receive.

After taking off from St. Louis, Missouri, the Respondent's aircraft received a clearance to an altitude of 230. They wanted that flight level at the time, but Cpt. Fox was really wanting to get a higher altitude because of certain verbal reports he had gotten from other TWA pilots when he was on the ground that had flown up from the Texas area. Everything went uneventfully in this situation until Kansas City Center put the aircraft on a frequency of 132.65. The Respondent, as the non-flying pilot, was responsible for dialing in that frequency, but before he could do it, he had written it down on his note pad correctly, 132.65, and had also acknowledged that frequency on the radio. His attention was diverted by the radar dials that he was working and he was also involved at the time with the altimeter because his co-pilot had indicated an altimeter change and so he dialed that in. It was after these two attentions were taken

care of that he erroneously dialed in the frequency of 132.6. Left off the last digit of 5.

I got the picture from Cpt. Fox's testimony of a busy cockpit, but not abnormally busy. Every cockpit is busy. That's why they require the cockpit crew that they do require on these aircraft. I didn't hear any sort of activity that would adequately explain and mitigate the captain's failure to dial in the correct frequency.

Had the correct frequency been dialed in in this case, the Respondent would not have heard the subsequent instruction to Northwest 229 to go up to 290 flight level, but, since he was on the wrong frequency, he heard that or rather, I should say, misheard that instruction to Northwest 229 and assumed the instruction as his own clearance and acknowledged that clearance with the words "up to 290, TWA 559." There was testimony of an FAA bulletin that it is the responsibility of a controller to listen to a pilot's read back. This is part of our "fail safe" procedure. If that controller had picked up on the fact that it was a TWA 559 aircraft that was acknowledging and accepting a Northwest 229 clearance, there would not have been this deviation because it would have been immediately brought to the attention of Cpt. Fox that that clearance was not for him, but it was not picked up on. I know it was not accepted or knowledged in the accepted manner of putting the identification of the aircraft first and then the rest of the language after that, but I don't think that is all that important. The important thing is it was acknowledged and the TWA 559 identification was clearly given. That should have been picked up by the controller. That is a very serious and important situation where one aircraft assumes the clearance that is meant for another aircraft. So in this case I find that, with respect to the 91.75(b) regulation that it took two to tango here. It took concerted errors to equal the deviation . . . to occur in

that the aircraft went up from its assigned 230 flight level toward the 290 flight level when it should not have.

I find that the Administrator has established 91.65(d) by a preponderance of the evidence. It was sheer out and out negligence on the part of Cpt. Fox not to set that frequency dial correctly and, in the long run, it did lead to all of these other things. So it made it very unfortunate in this case. An improper frequency setting always gives rise to potential danger so, therefore, the 91.9 has also been established. It is, therefore, ORDERED that the Respondent did act in violation of Sections 91.65(d) and 91.9 of the Federal Aviation regulations; provided, however, that no penalty shall actually be served in view of the timely filing of a NASA report.

Entered this 30th day of May, 1991 in Kansas City, Missouri.

/s/ JOYCE CAPPS

JOYCE CAPPS
Judge

Edited on 6/18/91

JUDGE CAPPS: There being nothing further before me, we stand adjourned.

I want to give you a handwritten copy of your client's appeal rights. Now we stand adjourned.

APPENDIX B

APPENDIX B

SERVED: March 31, 1994
NTSB Order No. EA-4076

Docket SE-11422
UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of February, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,
Complainant,

v.

HARVEY BONHAM FOX,
Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, issued on May 30, 1991, following an evidentiary hearing.[1] The law judge affirmed an order (complaint) of the Administrator finding that respondent had violated 14 C.F.R. 91.65(d) and 91.9.[2]

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[1] The initial decision, an excerpt from the hearing transcript, is attached.

[2] § 91.9 (now 91.13(a)) provided:
No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

The law judge affirmed these charges but dismissed the complaint to the extent it alleged that respondent had violated 14 C.F.R. 91.75(b).[3] (Respondent's use of his certificates was not affected by the Administrator's order or the law judge's decision, as any sanction was waived pursuant to the Aviation Safety Reporting Program.) We deny the appeal.

Respondent was the non-flying, pilot-in-command of Trans World Airlines' November 21, 1989 evening Flight 559 between St. Louis, MO and Austin, TX. The parties do not dispute the relevant facts.

Respondent assumed the radio and radar duties, having some concern for lightning in the area.[4] At 0212:51, ATC assigned him a new radio frequency (132.65) to use to contact Kansas City ARTC Center. He wrote that frequency down and acknowledged it.[5] Later, when respondent dialed in the 132.65 frequency, he omitted the "5," dialing 132.6 only.

According to respondent, on tuning in the incorrect frequency, he identified his aircraft (ostensibly at 0213:15, per Exhibit A-3). He was awaiting an acknowledgement from

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§ 91.65(d) (now 91.123(e)) read:
Unless otherwise authorized by ATC [air traffic control], no person operating an aircraft may operate that aircraft according to any clearance or instruction that has been issued to the pilot of another aircraft for radar air traffic control purposes.

[3] § 91.75(b) (now 91.123(b)) provided:
(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

[4] There apparently was only one set of headphones, and the communications were not broadcast in the cockpit.

[5] This aircraft had only a "single head" radio and, thus, could not dial in the next frequency and later switch the radio to it, as dual head radios permit.

ATC when he ostensibly heard a clearance directing an aircraft to climb and maintain 29,000 feet. (His earlier clearance had been to 23,000 feet. Exhibit A-2 at 0205:13.)[6]

Respondent interpreted the clearance ("Northwest 229 climb and maintain flight level two nine zero.") as one for his flight, TWA 559.[7] He responded: "Up to two nine zero TWA five five nine." Exhibit A-3 at 8, time 0213:27. At this point, he turned the radio over to the first officer.

The traffic controller manning the 132.6 frequency heard 559's clearance acknowledgement but was in the midst of talking with Northwest Flight 226 and did not catch respondent's call sign. The controller knew something was wrong (*see* Tr. at 10). Immediately following his assurance that the Northwest flight had received and understood its clearance (as it had not yet responded due to the erroneous call sign used), the controller attempted to contact respondent.

The 132.6 controller broadcast "OK other aircraft calling [unintelligible] Kansas City." He rebroadcast this message twice more, at 0214:14 and at 0214:38 ("[O]ther aircraft calling Kansas City say again"). TWA 559 did not respond. Respondent testified that, even if he had been on the radio and had heard that conversation (which he was not, having turned the radio over to the first officer), it would not have prompted any action on his part as he was convinced the earlier clearance was directed to TWA 559. Tr. at 79.

Some minutes later (beginning at 0216:32, some 4 minutes after 559 had been assigned the 132.65 frequency) the

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[6] Three transcripts are in the record. Exhibit A-2 is a complete, certified transcript prepared by the FAA. Exhibit A-4 is an excerpt of A-2. Exhibit A-3 contains respondent's version of conversations on the tape (Exhibit A-1), with interpretations and commentary.

[7] The controller mistakenly called the Northwest flight number 229 when issuing the clearance, and later mistakenly called it 225. It actually was Flight 226.

controller for the 132.65 frequency began his attempts to contact respondent's aircraft. He broadcast the aircraft's flight number twice seeking an acknowledgement, and on the land line apparently asked his fellow controllers for assistance. (It is not clear to whom he is speaking, but at 0219:10 he said "see if you still have a TWA five fifty nine there for me." At 0219:34, the controller on the 132.6 position called his supervisor. The controller of the 132.65 position, at 0221:38, also said on the land line: "this is twenty nine see if maybe a TWA five fifty nine came over with some of those other guys that wasn't suppose to [be] there I'm just trying to find him.")[8] Flight 559, receiving on 132.6, would not have heard any calls to it that were broadcast on 132.65.

At 0221:44, respondent (still on 132.6) radioed his position, "out of two eight zero for two nine zero." He testified at the hearing that this communication signified his intent to obtain a clearance to a higher altitude. Tr. at 77 ("it's kind of a gentle nudge. I'm trying to say I want higher."). ATC queried his position, determined it was acceptable, and told him he was on the wrong frequency and had assumed a clearance directed to another aircraft.

The law judge dismissed the § 91.75(b) allegation, finding that ATC contributed to the deviation when the controller manning the 132.6 frequency failed to catch respondent's call mistakenly assuming Northwest 226's clearance. Initial decision at 4 ("It took concerted errors to equal the deviation that did finally occur. . . ."). She, however, affirmed the claimed § 91.65(d) and 91.9 violations, stating:

> It was sheer out and out negligence on the part of Cpt. Fox not to set that frequency dial correctly and, in the long run, it did lead to all of these other things.

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[8]The controllers manning the 132.6 and the 132.65 frequencies are across the room from each other. Tr. at 8.

Initial decision at 5.

On appeal, respondent argues that these findings are internally inconsistent in that, if ATC was equally culpable in connection with the clearance deviation supporting the § 91.75 charge thus exonerating respondent, then he must be exonerated for the same reason on the "taking the clearance of another" charge. While respondent's argument may have some merit, we need not answer the question as we find ample support in the record and precedent for affirmance of the § 91.65(d) and 91.9 charges.[9]

We have held that we will not affirm the Administrator's order when ATC is the initiating or principal cause of the violation of the regulations. *See, e.g., Administrator v. Snead*, 2 NTSB 262 (1973); *Administrator v. Nelson and Keegan*, 2 NTSB 1900 (1975); and *Administrator v. Clary*, 3 NTSB 2380 (1980). These principles were most recently discussed in *Administrator v. Frohmuth and Dworak*, NTSB Order EA-3816 (1993), where we clarified that, even if a deviation from a clearance is caused by a mistake on the pilot's part, that mistake will be excused and no violation will be found if, after the mistake, the pilot takes actions that, but for ATC, would have exposed the error and allowed for it to be corrected.

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[9]We disagree with the law judge's conclusion that § 91.75 was not violated. Although the Administrator did not appeal the law judge's dismissal of the § 91.75 charge, and we therefore do not formally address the issue, we remain able to affirm the § 91.65 charge using a theory that would require (or permit) affirmation of the § 91.75 charge as well.

In her decision, the law judge was applying only one limited aspect of our precedent in her finding that ATC contributed to the deviation.[10] We cannot find here either that ATC was the initiating or principal cause of the incident or that respondent took all reasonable steps after his mistake and that it was ATC's fault that the mistake was not quickly exposed and resolved.

Respondent's first error was in his mis-entering of the frequency. After doing so, he did not take those reasonable actions that would have uncovered the mistake. Although the Administrator's transcript contains no reference to a squelch, listening to the tower tape itself confirms respondent's contention that he identified his aircraft to ATC at approximately 2:15:15. *See* Exhibits A-3 and A-2. Respondent, however, did not await an acknowledgment by that controller of his signing on the new frequency. He should have done so prior to his accepting any clearance. In that way, there would have been no doubt that two-way radio communications had been established. If the controller manning the 132.6 frequency had spoken directly to respondent's aircraft, the subsequent misappropriation of a clearance would have been far less likely to occur because the controller, immediately knowing to whom he was speaking, could immediately have corrected respondent's error.

Moreover, respondent's second mistake — accepting a clearance not directed to him — was not initiated by ATC, nor was ATC its principal cause. The controller for frequency 132.6 did not expect respondent on his channel, yet he reacted promptly when he realized there was a problem. And, the controller for frequency 132.65 did not wait an inordinately long time before he tried to raise respondent that he would excuse respondent's conduct, were such delay a factor in our analysis. The unrebutted evidence indicates

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[10]She found: "it took two to tango." Initial decision at 4.

that TWA 559 would have heard the conversation between Northwest 226 and ATC, confirming 226's clearance to 29,000 feet. TWA 559 did not call to clarify to whom the clearance was directed, nor did the aircraft respond to ATC's repeated request for aircraft that had called Kansas City to respond.[11]

Respondent also challenges the § 91.65(d) finding on the grounds that, allegedly, it applies only to willful acts. Respondent, however, offers no support for this proposition in the language of the subsection, in case law, or in a review of the rule's development. As the Administrator points out in reply, case law does not require proof of a willful act. *See Nelson and Keegan*, 2 NTSB 1900 (1975).[12]

Respondent also suggests that a finding against respondent here is inconsistent with the FAA's own interpretation and application of § 91.65(d). While this could be an important issue if true, the fact that the Administrator exercises prosecutorial discretion is not, we think, equated to a finding of inconsistent interpretation, especially when the facts of the cases are not the same. Thus, whether the law judge was correct in excluding material regarding the Administrator's determination not to prosecute another pilot, is at most harmless error.[13]

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[11] While it is not dispositive, we also note that respondent's allegedly routine query (at 0221:44) intended to suggest a higher clearance, is phrased in language much in the nature of what would be said in an initial sign on to a new frequency announcing his position and call sign.

[12] Respondent further suggests, but does not elaborate, that the rule applies only to formation flight. As with the above claim, in the absence of convincing support for this proposition, we must reject it.

[13] The Administrator asks that this rejected material, which respondent includes in his brief, be stricken from the record. We can see no real harm in respondent's presenting the documents rather than describing them. We deny the motion.

Finally, respondent argues that the § 91.9 finding was incorrect as a matter of law and fact. Respondent argues that the dialing in of the wrong frequency cannot be careless, in law or fact. Not only does this claim ignore respondent's later inaction, as detailed above, and the law judge's finding (initial decision at 3) that respondent was not unusually busy,[14] it ignores precedent, as set forth, for example, in *Administrator v. Haney*, NTSB Order EA-3832 (1993) and *Administrator v. Pritchett*, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there (a violation of an operational regulation is sufficient to support a finding of a "residual" or "derivative" § 91.9 violation). Respondent's additional argument that his action cannot be careless because there was no danger in the incident also conflicts with precedent. *Roach v. National Transp. Safety Bd.*, 804 F.2d 1147, 1157 (10th Cir. 1986), *cert. den'd*, 486 U.S. 1006 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to strike is denied; and
2. Respondent's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT and HALL, Members of the Board, concurred in the above opinion and order.

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[14] Respondent also testified that things in the cockpit were normal. Tr. at 85.

APPENDIX C

APPENDIX C

No. 94-1638

United States Court of Appeals
For the District of Columbia Circuit

September Term, 1995

United States Court of Appeals
For the District of Columbia Circuit

Filed December 26, 1995

HARVEY BONHAM FOX,
Petitioner

v.

DAVID R. HINSON, Administrator,
Federal Aviation Administration;
National Transportation Safety Board,
Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL TRANSPORTATION SAFETY BOARD

BEFORE: Silberman, Sentelle, and Randolph, Circuit Judges

JUDGMENT

This petition for review and the motion of the Administrator of the Federal Aviation Administration to strike, and the response thereto, were considered on the record from the National Transportation Safety Board ("NTSB") and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED that the portion to strike be granted. Because the document entitled "Offer of Proof" was not submitted to

the NTSB, it may not properly be made a part of the record on appeal. It is

FURTHER ORDERED AND ADJUDGED that the petition for review from the NTSB's order served March 31, 1994, be denied for the reasons stated in the accompanying memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

No. 94-1638 — *Harvey Bonham Fox v. David R. Hinson, Administrator, Federal Aviation Administration*

MEMORANDUM

The NTSB's decision that petitioner violated sections 91.9 and 91.65(d) of the Federal Aviation Regulations ("FAR") is supported by substantial evidence. *See, e.g., Throckmorton v. Nat'l Transp. Safety Bd.*, 963 F.2d 441 (D.C. Cir. 1992). Petitioner violated the above FAR regulations by first improperly setting his radio to the wrong frequency, failing to establish two-way communication to ensure that he was connected to the controller monitoring his air space, and mishearing and accepting a clearance issued to another flight which did not have a similar call sign. Air traffic control was not the initiating, or principal, cause of petitioner's deviation from his assigned altitude. *See, e.g., Administrator v. Frohmuth and Dworak*, NTSB Order EA-3816, 1993 WL 75479 (1993); *Administrator v.*

Nelson and Keegan, 2 NTSB 1900 (1975); *Administrator v. Snead*, 2 NTSB 262 (1973).

Moreover, the NTSB properly determined that the incident involving the other TWA flight, evidence of which petitioner unsuccessfully sought to introduce at trial, is factually distinguishable from the instant case; therefore, its exclusion was harmless error. Finally, the Administrative Law Judge's determination that the testimony of the FAA's expert was more credible than that of petitioner's expert is entitled to great deference. *See Chen v. General Accounting Office*, 821 F.2d 732, 738 (D.C. Cir. 1987).

APPENDIX D

APPENDIX D

14 C.F.R. PART 91.9

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.